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IN THE

Supreme Court of the United States

October Term, 1959

No. 235

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
v.
J. A. MOORE and FARRIS ANTOINE, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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To: *The Honorable Supreme Court of the United States:*

Above named Respondents, by this Brief in Opposition, respectfully represent that Petitioner has not shown any good, valid or sufficient reasons why this Honorable Court should grant its Petition for Writ of Certiorari.

OPINION BELOW

Since the authorities cited in the footnotes of the Opinion of the Court of Appeals (R. 448), as printed in Appendix "A", on pages 33 to 39 of said Petition for Writ of Certiorari, are incorrectly printed in several instances both as to volume number and page number, we cite Your Honors to the Opinion of said Court of Appeals as reported in 264 F. 2d 754, where the authorities are correctly printed, and which also contains the Memorandum Opinion of the United States District Court in the consolidated cases at bar.

JURISDICTION

Although this Supreme Court has jurisdiction under 28 U.S.C. Sec. 1254, there are no genuine or meritorious motivating factors which require this Honorable Court to exercise its jurisdiction or to grant a Writ of Certiorari herein, and the reasons advanced by Petitioner for the granting of such Writ are deceptively specious, as we shall hereinafter demonstrate.

QUESTIONS PRESENTED

There actually is no Federal question involved in the two consolidated cases at bar. They were tried in the United States District Court, and jurisdiction was vested therein, solely on the ground of diversity of citizenship (R. 27, 30).

As stated in the Opinion of the Honorable Court of Appeals, these cases for damages for wrongful discharge of Respondents by Petitioner, from further employment under their respective contracts, were gov-

erned by general common law and by the law of Texas, as settled by the Supreme Court of Texas (the highest court of that State) in *Texas & New Orleans R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. 2d 716, and by the United States Supreme Court in *Moore v. Illinois Cent. R Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089.

Ingenious counsel for Petitioner, by resorting to both state and federal cases which have been overruled and long since consigned to the "junk heap" as bad law; namely, the cases of *Matlock v. G. C. & S. F. R. Co.*, 99 S.W. 2d 1056 (Tex. Civ. App.) and *Buster v. Chicago, M. St. P. & P. R. Co.*, 195 F. 2d 73 (7th Cir. Ct. App.), have cleverly sought to have this Honorable Court abandon its previous holdings in the case of *Moore v. Illinois Cent. R. Co., supra*, and to assume the role of Congress by holding that the investigative Board (comprised *solely* of the Railroad's officials, as in the cases at bar), constitutes an "administrative agency" under the statutes of the United States, and to then further hold *as a matter of law* that the rulings of such investigative Board (discharging Respondents from their employment) were not subject to review by the Courts or jury where there was *any substantial evidence* to support such Board's rulings.

In plain, judicial righteousness, the real questions presented here are: Should this Honorable Court grant a Writ of Certiorari in these cases, to the end that such citizens be deprived of their inalienable and constitutional right of trial by jury in such common law actions by the means of unconstitutionally extending the so-called "substantial evidence rule" to such private Boards consisting of the Railroad's officers (who are, by the very nature of their

offices and allegiance, the "sole prosecutors, judges, jury and executioners" as to such employees' rights and remedies)? Correlatively, should this Honorable Court utterly relinquish to such private Board the jurisdiction of the Supreme Court and of other federal and state courts by the means of erroneously holding that such private Board is a federal administrative "agency" whose findings are conclusive if based on "substantial evidence", when neither Congress nor the Texas Legislature has so intended or empowered such private Board to substitute itself for the courts or jury under our system of jurisprudence, and especially when this Honorable Court, the 5th Court of Appeals, and the highest Appellate Courts of Texas, have held to the very contrary under the latest decisions hereinafter cited?

STATUTES INVOLVED

The statutory provision in 49 U.S.C., Sec. 1, paragraph (7), printed as Appendix "B" on pages 41-43 of Petition for Writ of Certiorari, is not involved in these two Civil Actions for damages for wrongful discharge of Respondents because, even if incidentally involved, it completely passed out of the picture when the United States District Court, on the Motion of the Government's attorneys, dismissed the criminal case and Indictment against Respondents in Criminal Case No. 12475, *United States of America v. Jasper A. Moore and Farris Aultoine* on March 9, 1955, prior to the Investigation Hearing held by the Railroad's officials on March 17, 1955 (R. 58-61; Plaintiffs' Exhibit No. 1, R. 322-325; Defendant's Exhibit No. 1, R. 346-347; Plaintiffs' Exhibits Nos. 4 and 5, R. 341-342). Actually, Petitioner has, for the first time on this appeal,

invoked such statute on page 2 of its Petition for Certiorari. The only statutes, directly involved, are the following:

(1) Railway Labor Act, 45 U.S.C. Sec. 153 (i), which provides that:

> "The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances * * * rules*, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board (National Railroad Adjustment Board) with a full statement of the facts and all supporting data bearing upon the disputes."

(2) Administrative Procedure Act, 5 U.S.C. Sec. 1001 (a) which provides:

> "(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than * * * the courts. * * * Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title (relating to publication of information, etc., except where secrecy in the public interest or any matter relating solely to the internal management of an agency are involved) *there shall be excluded from the operation of this chapter (1) agencies composed of representatives of organizations of the parties to the disputes determined by them* * * *".

STATEMENT

Respondents make this Statement, under Rule 40(3) Supreme Court Rules, deeming it necessary, in order to correct some inaccuracies, omissions, and misstatements on the part of Petitioner which may inadvertently lead this Honorable Court to the wrong conclusion. The Statement on pages 3 to 11, inclusive, of the Petition for Certiorari is devoted mainly to the alleged investigation proceedings and hearing by the Railroad Company's officials of the purported violation by Respondents of Rule "N" of Petitioner's Book of Rules (R. 32); which charges were based upon a written report, in the form of a letter, dated November 30, 1954, addressed to Mr. E. C. Sheffield, Petitioner's General Manager of its Texas-Louisiana Lines, signed by its specially-hired, highly-paid, so-called "reliable" two colored investigators, Nicholas Christopher Mann and George Norton. As to the *reliability*, or rather *credibility*, of these two colored investigators, Nicholas C. Mann, in response to questions by Petitioner's attorney on the trial, admitted that he had been arrested several times and had served terms in the penitentiary (R. 246-248) and his Police Record showed at least five arrests and convictions, including felony convictions of forgery, possession of forged seaman's certificate, and unlawfully wearing Navy uniform (R. 70-71; 199; 352); and at the time he signed the letter which brought about such investigation Hearing by the Railroad Company's officials, it was also brought to the attention of Petitioner's officers that the other colored investigator, George Norton, was under indictment for murder (R. 71; 358-359). In contrast, Respondent Moore was 65 years old at time of trial, a 32nd degree Mason, had a good reputation and a good record

with Petitioner, and had worked for Petitioner and its predecessor as a passenger trial flagman, freight conductor and passenger train conductor for over 40 years prior to his suspension on December 2, 1954 (R. 110-111; 72; 93). In further contrast, Respondent Antoine had worked for Petitioner as a trainman and passenger train porter for almost 12 years (excepting the time he spent in military service (R. 150-151), and Petitioner's General Manager, Mr. V. A. Gordon, admitted that Porter Antoine had a good record of service both prior to and after World War II (R. 72).

The following statements of Petitioner: "At the trial of the case testimony with reference to whether or not Respondents were actually guilty of the charges preferred against them was substantially the same as that recited above, which was brought out at the hearing", and: "At the trial of the case the Respondents presented no other or further evidence or testimony which would prove or tend to prove their innocence of the charges made against them", on pages 11 and 12 of the Petition for Certiorari, are such abstract absurdities as to make a mockery of the well-established rule of law that when ruling on Petitioner's Motions for a Directed Verdict (R. 190-193; 320) and when ruling on Petitioner's Motions for Judgment Notwithstanding the Jury Verdicts (R. 398-401; 402-405) it was the duty of the Trial Court to consider the testimony and evidence in the light most favorable to Respondents, and to disregard all of the testimony and evidence favorable to Petitioner, and to indulge every reasonable intendment deducible from the stipulations and evidence in favor of each Respondent, and to give Respondents the benefit of those portions of the testimony

and evidence, both direct and circumstantial, together with all reasonable inferences to be drawn therefrom, which tended to support Respondents' cases for damages for wrongful discharge, since the ordinary rules of evidence and procedure *at common law* should have been applied in that type of suits.[1] The absurdity of the above quoted statements from pages 11 and 12 of its said Petition is best illustrated by the fact that the transcript of the Railroad official's Hearing (Deft's Ex. No. 1, R. 346-375) consumed only 29 pages of Vol. II of the Record, whereas the Court Reporter's transcript of the testimony of the witnesses and documentary evidence on the trial in the District Court (not including Deft's Ex. No. 1) covered over 300 pages (R. 44 to 345, Volumes I and II). To carry its absurdities to the extreme, overzealous Counsel for Petitioner, on page 25 of its Petition, recklessly state that Respondents were charged by their employer with stealing from it, and that: "These two men were caught red-handed", and that since Petitioner's Board of officials were "of the opinion that the two employees were guilty of the charges" * * * "They constitute good cause for discharge"; and, after lamenting the fact that the jury did not choose to believe the testimony of either the two colored so-called "special investigators" or of Petitioner's officers or its other witnesses, and the fact that by its verdicts the jury found that these two Re-

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[1] **Swift & Co. v. Morgan & Sturdivant**, 211 F.2d 115, 116; 49 A.L.R. 2d 924 (5th C.A.);
Coleman v. Graybar Elec. Co., 195 F.2d 371 (5th C.A.);
Railway Express Agency v. Mallory, 168 F.2d 426 (5th C.A.) Cert. Den. 69 S.Ct. 18, 335 U.S. 824, 93 L.Ed. 378;
Phillips Pet. Corp. v. Gibson, et al, 77 S.Ct. 16, 352 U.S. 874, 1 L.Ed. 2d 77, vacating Judgment of 5th C.A., 232 F.2d 13, on Writ of Cert., for failure to apply local law of Texas.

spondents were wrongfully discharged, without good cause or reason. Petitioner then wails about the action of its officers in discharging these men, that: "it's damned if it does and it's damned if it doesn't" on page 27 of its Petition for Certiorari. The fact that Petitioner was condemned by the jury to pay these two long and faithful employees damages for their wrongful discharge was not the fault of either our jury system or of our state or federal laws. Petitioner's own damnation was caused by the fact that its officials did not exercise common ordinary prudence or diligence in hiring reasonable, reliable and credible men to investigate the alleged mishandling of cash fares on its trains, but, instead, its General Manager and its Special Officer hired the two colored men, Mann and Norton, who had criminal records, through the Sheriff's Office, to make such alleged investigation (R. 198-201; 211; 215-220; 63-67). The one whom Petitioner's officials principally relied on, in the criminal case which was later dismissed by the Government's attorneys, and in the Railroad's investigation hearing *which was held after the dismissal of the criminal case*, namely, Nicholas Christopher Mann, was a self-confessed professional "stool-pigeon", a forgerer, and whose cross-examination showed that he had committed perjury in connection with his testimony in the cases here involved (R. 250-265). The testimony of Petitioner's officials, Mr. Gordon and Mr. Dollar, (who were members of its private Board and who persisted in holding the farcical hearing after the federal Government had dismissed the criminal cases on its own Motion) that *such executive officers relied solely on the unsworn and unverified statements of those two specially hired colored investigators* in discharging Respondents (R. 70-72; 75-76; 92-95) *regardless of what Respondents*

had to say, was enough to convince the jury that Respondents had been unjustly dealt with and had been wrongfully discharged by Petitioner's officials. Although "marked money" had been purportedly used by the Petitioner in connection with its alleged investigation, its attorney, HOWARD S. HOOVER, Esquire, *admitted that no marked money was found on search of either of Respondents after their arrest, and that there was no "marked money" involved in either of Respondents' cases* (R. 224-228, Vol. II). Although "investigator" Mann testified that he had handed Porter Antoine three five-dollar bills and one one-dollar bill, wrapped up in a ball for transportation of him and the other "investigator" Norton from New Orleans to Houston (R. 243), Norton testified that he did not see Nicholas Mann hand Farris Antoine anything (R. 307), and *that he did not see Mann hand Porter Antoine any money*, and *that he, Norton, did not make a statement to that effect* when the statement was dictated to a lady at the Sheriff's office on November 30, 1954, *and that he, Norton, wouldn't know whether Mann had even given Porter Antoine anything* (R. 308-310). Further, Norton also positively testified that he did not see Porter Antoine give Conductor Moore any money on that trip (R. 311). Petitioner's star-witness, Nicholas Mann, even testified that he could not say, as a matter of fact, that Conductor Moore got any part of any money that Mann claims he gave to Porter Antoine; and that he did not see Mr. Moore receive any money from Porter Antoine; and that he, Mann, could not really say, and did not know, whether Mr. Moore had any knowledge at all about any alleged transfer or exchange of $16.00 between Mann and said Porter (R. 289-290).

These are but a few illustrations of what the Record truly reflects as to Petitioner's trumped-up charges against Respondents. In view of this, how can Honorable Counsel for Petitioner say, with a straight face, before this most dignified and honorable Court in the country, that "These two men were caught red-handed" stealing from their employer?

As briefly shown, there were so many contradictions, conflicts and discrepancies between the testimony and statements of Petitioner's two well-paid and specially hired colored investigators and the testimony and statements of its officers and other witnesses, largely brought out by Respondents' counsel, putting Petitioner's officials on the stand under the "adverse witness rule" and by such cross-examination of Petitioner's witnesses, as to shatter and destroy the credibility and "reliability" of Petitioner's witnesses, that it would render this Brief unduly prolonged if we were to recite each such contradiction, conflict and discrepancy, or even if we should attempt to point out the mass of evidence supporting Respondents' damage suit and the jury's verdicts in their favor. Suffice it to say that, after carefully considering the lengthy two-volume Record and full Briefs of both sides, our position has been found to be correct and just in the following words of the Honorable Fifth Circuit Court of Appeals, quoted from 264 F. 2d at page 757, to-wit: "* * * we find ourselves in full agreement with all of plaintiff's contentions * * * *that there was ample evidence to take the cases to the jury and to support the verdicts in plaintiffs' favor;* and that the judgment non obstante veredicto must, therefore, be reversed."

On the trial below, Petitioner stipulated with Respondents that, in both cases, no relief was sought by either Re-

spondent under the Second Count of their respective Complaints; which Pre-Trial Stipulations therefore limited Respondents' claims to suits for damages for wroungful discharge, as sought in the First Counts of their Complaints (R. 29; 32; 7-9; 14-17). Even though the Trial Court in its Charge to the Jury wrongly placed the burden of proof on Respondents, when the burden really rested on Petitioner to prove that the discharges of Respondents were for good cause or reason under the authorities cited by the Court of Appeals in 264 F. 2d at page 755, Petitioner cannot now urge that these two cases were not governed by the common law or by the Texas law (which follows the law as established by the United States Supreme Court in *Moore v. Illinois Cent. R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089), especially since Petitioner, itself, did not object or except to the Court's Charge, as a whole, or to any part thereof (R. 386), and when such Charge, considered as a whole, did charge the jury as to Respondents' right to recover damages for their wrongful discharge by Petitioner (R. 375-383; 388-391); and where the jury, by its General Verdicts (R. 391-392), found in favor of each Respondent for their respective damages resulting from such wrongful discharge from service; and where there was ample evidence to support such jury verdicts in favor of Respondents, as so found by the Court of Appeals, as aforesaid.

REASONS FOR NOT GRANTING WRIT

The reasons for denying Writ of Certiorari are five-fold in these two consolidated cases, in this:

(1) The Board of Railroad officials, holding the investigation hearing resulting in the discharge of Respondents; was not an administrative agency, under

either the Administrative Procedure Act or the Railway Labor Act, to whose decisions the so-called "substantial evidence rule" would apply.

(2) In such suits as Respondents' for damages for wrongful discharge, they were not required by the Railway Labor Act to seek adjustments of their controversy with either the private Board of Railroad's officials or the National Railroad Adjustment Board as a prerequisite to the filing of suits for damages for wrongful discharge.

(3) There is no such conflict of decisions (as contended by Petitioner) between the holding of the Fifth Circuit Court of Appeals in the cases at bar and the holdings of it and other Courts of Appeals or the Texas Courts in the cases cited on page 17 of the Petition for Writ of Certiorari.

(4) The decision of the Court of Appeals in the cases at bar is clearly correct both under Texas law and under Federal law.

(5) There is no important question of Federal law involved that has not already been settled by this Honorable Supreme Court.

ARGUMENT

The reasons for not granting the Petitioner's Writ are so interwoven and related that we shall not undertake to argue them separately, but will present them in the order mentioned, as a group.

The Pre-Trial Stipulation in each Respondents' cases: That "No relief on the part of plaintiff is here sought under the Second Count of his original complaint" (R. 29;

32); was, in effect, that no relief by either Respondent was sought under the administrative procedure sections of the Railway Labor Act, and had the effect of restricting Respondent's respective claims to common law actions for damages for wrongful discharge. Such stipulations, alone, should suffice as ground for denial of Writ of Certiorari on behalf of Petitioner.

Sec. 153, Title 45, U.S.C., of the Railway Labor Act, provides for an administrative agency known as the "National Railroad Adjustment Board". Such Act was originally enacted in 1926, ch. 347, Sec. 3, 44 Stat. 578, and was amended in 1934, ch. 691, Sec. 3, 48 Stat. 1189, which was long prior to the enactment of the Administrative Procedure Act in 1946, Ch. 324, Secs. 1 to 11, Stat. 243, 5 U.S.C., Secs. 1001-1011. By the very terms of Sec. 1001(a), 5 U.S.C., which is quoted above on page 5 of this Brief, the administrative procedures of the Railway Labor Act, above mentioned, are excluded under the following wording of such Section 1001(a) of the Administrative Procedure Act; "there shall be excluded from the operation of this chapter (1) agencies composed of representatives of organizations of the parties or of representatives of organizations of the parties to the disputes determined by them * * *".

It has been so judicially determined, especially in cases where railroad employees have elected to pursue their administrative remedies through the Railroad Adjustment Board, in the following cases: *Stranford v. Pennsylvania Railroad Co.*, 155 F. Supp. 680 (D.C. N.J.); and *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (3rd C.A.). In the case of *Stranford v. Pennsylvania Railroad Co.*, supra, the Court said:

> "Although Section 1009(a) of the Act affords a judicial review to parties aggrieved by agency action, Section 1001(a)(1) defines agency so as to exclude 'agencies composed of representatives of the parties or representatives of organizations of the parties to the dispute.' Therefore, since the Railroad Adjustment Board is composed of representatives of the parties as provided by Section 153 of Title 45, supra, it is excluded from the operation of the Administrative Procedure Act and a party aggrieved by this Board's decision cannot seek a review under this Act."

If it applied, at all (which it does not, as we shall hereinafter show) the administrative agency and procedure mentioned in Sec. 153, subparagraph (i), 45 U.S.C., of the Railway Labor Act, would, under the authorities above mentioned, take precedence over the provisions of the Administrative Procedure Act. In the cases at bar, however, Respondents did not choose to refer their claims against Petitioner to the National Railroad Adjustment Board, and were not required to do so, hence Petitioner's contention that these cases should be governed by the so-called "substantial evidence rule" absolutely has no merit. Likewise, its contention that Respondents were required to exhaust their administrative remedies by reason of such Sec. 153, subparagraph (i), 45 U.S.C., or under any agreement between Respondents' labor organizations and the Petitioner, is laid to rest by the decision of the United States Supreme Court in the case of *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, wherein this honorable Court said:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to

make an administrative finding a prerequisite to filing suit in court. In support of its contentions, the railroad points especially to Section 153(i), which, *as amended in 1934*, provides that disputes growing out of grievances or out of the interpretation or application of agreements 'shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes MAY be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.' And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was *unjust*. It is to be noted that the section pointed out, Sec. 153 (i), *as amended in 1934, provides no more than disputes 'MAY be referred* * * * to the * * * Adjustment Board. * * *' It is *significant* that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, *before the 1934 amendment*, provided that upon failure of the parties to reach an adjustment a *'dispute shall* be referred to the designated adjustment board by the parties, or by either party * * *." Section 3(c). *This difference in language, substituting 'MAY' for 'shall', was not*, we think, *an indication of a change in policy, but was instead a clarification of the law's original purpose.* For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion.

> On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals *properly decided that petitioner was not required by Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for a wrongful discharge.*" (Emphasis ours)

This landmark case was followed explicitly by the Supreme Court of Texas in the case of *Texas & New Orleans R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. 2d 716, 719, where, after quoting the above excerpt from the *Moore v. Illinois Central* case, the highest Court of Texas said:

> "The opinion of the Supreme Court, as above quoted, gives the substance of the collective agreement and immediately continues its discussion of the meaning and policy of 45 U.S.C.A. section 153 (i), the Railway Labor Act, evidently treating the agreement as being in furtherance of that Act *and not intended to require the employee to seek adjustment of his controversy with the RAILROAD OFFICIALS as a prerequisite to suit when the Act itself does not require him to do so.*"

And, after applying the decision of the United States Supreme Court, above quoted, the Texas Supreme Court said:

> "* * * and that court expressly held that *the agreement did not make the railroad officers the sole or the final judges of the justice of the cause for discharge of the employee, and that appeal to the highest operating officer for reinstatement was not made a prerequisite to an appeal to the court for damages*," and, as said in the lower

appellate Court, "*there is nothing in the agreement* (same as in Appellants' agreements) *that requires the employee to seek administrative relief as a condition precedent to his suit in court for wages alleged to have been earned.*"

The latest Texas case, construing favorably to Respondents the provisions of such Sec. 153(i) of the Railway Labor Act, is *Atkinson v. Thompson*, 311 S.W. 2d 250 (Tex. Civ. App., at Houston) which was approved by the Texas Supreme Court by refusing to grant a Writ of Error, there being No Reversible Error committed by the Appellate Court.

On pages 16 and 17 of the Petition for Certiorari, Petitioner erroneously asserts that the decision of the Court of Appeals in the instant cases is contrary to the holding of the Court of Appeals for the 7th Circuit in the case of *Buster v. Chicago, M. & St. P. & P. R.*, 195 F. 2d 73; and to the prior holding of the 5th Circuit Court of Appeals in the case of *Thompson v. Moore*, 223 F. 2d 91, and to the declaration of Texas Law in the case of *Matlock v. G. C. & S. F. Railroad Co.*, 99 S.W. 2d 1056. (writ dism.). The *Buster* case, by the 7th Court of Appeals, is not authority for the application of the so-called "substantial evidence rule", since it affirmed the action of the Trial Court in setting aside the jury's verdict as being "*contrary to the overwhelming preponderance of the evidence*", and on the further ground that the *undisputed evidence* showed that Buster had violated a company rule in that he was fighting on the company's premises, which fact he could not and did not deny on the trial of the case; and furthermore, in the Record on appeal, the *undisputed evidence* showed that Buster had suffered *no loss*

whatsoever from a financial standpoint by reason of his discharge by the railroad officials, because he actually received in wages from other employers, from the time of his discharge to the date of trial, *more money* than the jury awarded him by its verdict as damages for claimed wrongful discharge. In view of such *undisputed evidence and state of the record*, the 7th Circuit Court said: "* * * *Although we do not approve of the course which that court* (trial court) followed in arriving at its conclusion, it did reach the right conclusion", in entering judgment for the railroad, dismissing Buster's Action. Under such *undisputed evidence*, the 7th Circuit Court of Appeals could not do otherwise than affirm the lower Court's judgment in favor of the railroad for the simple reason that Appellant had not sustained any damages. Anything further, that such 7th Circuit Court had to say about there being "no substantial evidence in this record which would justify a finding that plaintiff did not have a fair and impartial hearing in September, 1947, on the charge that he had violated company rules" (as quoted by Petitioner on pages 17-18 of its Petition), is pure surplusage, injected by Petitioner apparently to confuse Your Honors, as it did in the Trial Court on its motion for judgment n.o.v.

It is significant to here mention that the *Buster* case has never been followed by later decisions of the 7th Circuit Court of Appeals or by any other Court of Appeals; and, that, in reversing both the 7th Court of Appeals and the trial court where judgment n.o.v. had been rendered for defendant, the United States Supreme Court in *Tennant v. Peoria & Pekin U. R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520, very aptly said:

> *"Courts are not free to reweigh the evidence and set aside the jury verdict merely* because the jury could have drawn different inferences or conclusions or *because judges feel that other results are more reasonable.*
>
> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial."*

The decision by the 5th Court of Appeals in the case of *Thompson v. Moore*, 223 F. 2d 91, is neither contra to that Court's decision in the cases at bar, nor does the case of *Matlock v. G. C. & S. F. Railroad Co.*, 99 S.W. 2d 1056, correctly declare the present Texas Law, in these type of cases, as contended by Petitioner. Had learned counsel for Petitioner merely taken the time to read the Trial Court's decision in *Moore v. Thompson*, 131 F. Supp. 665, by the late distinguished Judge Allred (whose decision was affirmed by the 5th Court of Appeals in 223 F. 2d 91) they would readily have seen that the very same contention they are urging in the instant cases was held to be futile, and that the decision in the *Matlock* case (Tex. Civ. App.), which was decided in 1936, has later been expressly overruled by the Texas Supreme Court in the case of *Texas & N. O. R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. 2d 716, and again in the recent case of *Atkinson v. Thompson*, 311 S.W. 2d 350 (Error Ref. N.R.E.).

The decision of the late Judge Allred in the *Moore* case, and the affirmance thereof by the 5th Court of Appeals in 223 F. 2d 91, are both soundly upon the decisions of

the United States Supreme Court in *Moore v. Illinois Central R. Co.*, supra, and of the Texas Supreme Court in *Texas & N. O. R. Co. v. McCombs*, supra; and to illustrate, we quote from the opinion of the learned Judge Allred, in 134 F. Supp. 665, 666:

> "It is true that the Texas Supreme Court decided the McCombs case in the light of the Moore case and 'for the sake of uniformity of decision'; and stated that it 'should follow the Moore case rather than the decisions of the courts of civil appeals'. The Texas Supreme Court expressly refers to *Wyatt v. Kansas City Sb. R. Co.*, supra, and 'similar decisions,' (including *Matlock v. Gulf, C. & S. F. R. Co.*, Tex. Civ. App., 99 S.W. 2d 1056, *which the Supreme Court expressly overruled*).
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> "Regardless of the basis of the McCombs decision, it remains the local law, announced by the highest court in this State in Railroad employee cases. The employment agreement in the McCombs case contained stronger language and more specific details as to procedure for seeking relief than the one here involved. The Texas Supreme Court held that while the McCombs agreement gave him the right to appeal to the highest company officials, it did not require him to do so; *and that there was nothing in that agreement that required the employee to seek administrative relief as a condition precedent to court action.* While that case dealt with a claim for overtime, there is no distinction in principle from a like provision dealing with unlawful discharge."

The contracts of the conductors in that *Moore* case and the present *Moore* case are almost identical. We, therefore, respectfully say that the decision of the 5th Circuit Court of Appeals, in the cases at bar, is clearly and eminently

correct, both under the present Texas Law and under prior decisions of such 5th Court of Appeals and of this Honorable Supreme Court.

As this Honorable Supreme Court and the 5th Circuit Court of Appeals have so clearly pointed out that the cases at bar are governed by the present Texas Law, and that Respondents' claims for damages for wrongful discharge by Petitioner, under the election of remedies so chosen by Respondents come within the rules of general common law, and that they were not required thereby to either resort to or exhaust the remedial procedures and remedies provided by their contracts of employment with Petitioner or by the provisions of Sec. 153, (i), 45 U.S.C., of the Railway Labor Act, it axiomatically follows that there is no important question of Federal law involved in the instant cases that has not already been settled by this Honorable Supreme Court. The remote and far-fetched probability that either the Petitioner or its officials *might* become subject to the penalties of Sec. 1, Para. 7, 49 U.S.C. (if it could possibly ever be proven on a Criminal Indictment that Respondents were guilty of permitting Petitioner's "special investigators" Mann and Norton, to have free transportation from New Orleans to Houston on Nov. 29, 1954) does not make it an important federal question for review by this Honorable Court, for the simple reason that the Criminal Indictment No. 12475 against Respondents (R. 322-325) was dismissed on the Government's own motion, and that Respondents have never been re-indicted nor further criminally prosecuted for such alleged offense, or any similar offense, involving such alleged transportation of said Petitioner's specially-hired employees.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied; and only in the event this Court grants such a Writ on the primary Petition of the Railroad Company, then only in such event, Respondents as Cross-Petitioners pray that such a Writ issue solely for the purposes of applying the local law of Texas by directing the Clerk to perform the ministerial acts of entry of judgments for Respondents on the General Verdicts of the jury in their favor, as of the date of May 15, 1958, by virtue of Rule 58 F.R.P., on such Reversal by said Court of Appeals of the judgments non obstante veredicto entered by the Trial Court, since Petitioner did not comply with Rule 50 (b) F.R.P., by joining a Motion for New Trial with its Motion for judgment n. o. v., or by praying for a New Trial in the alternative to such Motion n.o.v., while the Trial Court still had jurisdiction. Since the facts were fully developed on the trial and "there was ample evidence to take the cases to the jury and to support the verdicts in plaintiffs' favor", and since these cases are governed by Texas law, as stated in the Opinion of the Court of Appeals, we respectfully suggest that Rule 50 (b) of the Federal Rules of Procedure should be by this Honorable Supreme Court construed in the light of Rule 434, Texas Rules of Civil Procedure, adopted by the Supreme Court of Texas; the pertinent part of which provides that: "When the judgment or decree of the court below shall be reversed, the (appellate) court shall proceed to render such judgment or decree as the court below should have rendered". The action of Petitioner, in causing the Trial Judge to erron-

cously render such judgments in Petitioner's favor notwithstanding the verdict of the jury, has resulted in the present confused state of the non-final judgment of the Court of Appeals which has directed that these cases be "remanded to afford the district judge the opportunity to determine whether judgments should be entered on the verdicts or whether a new trial should be granted"; and well-planned action on the part of Petitioner was calculated to, and did cause, and still causes, Respondents to be deprived of their rights of trial by jury and of the valuable and non-replacable jury verdicts in their cases; which rights the writers of our United States Constitution had intended to guarantee to Respondents by the 7th Amendment thereto. Under such circumstances, we feel that it is the duty of the Supreme Court to direct the clerk or the court below to so enter the judgments for Respondents on such General Verdicts of the jury. Otherwise, such constitutional guaranties and the provisions of Rule 58 F.R.P., as to the clerk's ministerial acts and duty of entry of judgments on General Verdicts (which this Court evidently promulgated to speed justice) are frivolous and meaningless.

Since the Honorable Trial Court has, in more ways than one as shown by the Record, violated the constitutional rights and guaranties of Respondents, both against unlawful deprivation of their property rights and their rights of trial by jury, may we sincerely ask: What guarantee do Respondents have that, upon such remand of these cases to the same Trial Judge, they will not be further judicially ravished?

Under the teachings to lawyers and jurists, from time immemorial, it has been the ideology that the courts

(including this Honorable Court) should, without violating such constitutional guaranties either as to property, personal or jury rights, bring about the earliest possible termination of litigation. We thus believe that the Supreme Court intended, by promulgating Rule 50(b) F.R.P., that where a party invokes this new jurisdiction which the Trial Court not have at common law) by a Motion for Judgment n.o.v., without at the same time either joining such Motion n.o.v., a Motion for a New Trial, or praying for a new trial in the alternative to such Motion n.o.v., as provided by Rule 50(b), such moving party thus waives his right to file a Motion for New Trial, many years and terms later under Rule 59(a) F.R.P., after having gambled on a Motion for Judgment n.o.v., under Rule 50(b).

Otherwise, after an appeal by the party against whom the Judgment is rendered notwithstanding the jury-verdict in his favor, on a reversal and remand, with the privilege extended to the same Trial Court, at his own discretion, to grant a new trial, litigants are again, as in the trial of these cases at bar, subjected to the same whims and caprices of the Trial Judge as they were in the beginning, except that, as a matter of practice, they are actually at a greater disadvantage. You, as honorable men, already know the answer to our plight. The simple solution is for Your Honors to hold that, by reason of Petitioner's election to file such Motion for Judgment n.o.v., under Rule 50(b), without either joining therein a Motion for New Trial or praying in the alternative for a New Trial, it wholly waived its right to ask for a New Trial after expiration of many years and terms of Court, where no motion has ever been filed for a New Trial, because

the very wording of that sentence in Rule 50(b) that "A motion for a new trial may be joined with this motion (n.o.v.) or a new trial may be prayed in the alternative" means that Petitioner should, without delay and during term-time, choose between relying on the provisions of Rule 50(b), or of Rule 59(a), and that if Petitioner elects to rely on Rule 50(b), as in the cases at bar, it is limited to the relief provided by Rule 50, both as to (a) and (b) thereof.

Otherwise, the interminable litigation and heavy burden of costs imposed upon Respondents by such an Order of an Appellate Court that these cases be remanded to the District Court to afford it the "*opportunity*" to *choose* whether judgment should be entered on the verdicts or whether a new trial should be granted, leaves the matter again within the *sole discretion* of the same Trial Judge, who was reversed for doing what he should not have done for Petitioner in the first place. This travesty on justice cannot be rectified by the hands of God, alone, but with His guidance a clarifying stroke of the pen by the Honorable Members of this Court would be of great help, lest Respondents and their attorneys die of old age before final termination of this long-drawn-out litigation.

In the event such Writ is granted, Respondents respectfully request that judgment be here rendered in their favor, or in its Mandate this Court direct the Clerk to perform his ministerial act, under Rule 58 F.R.P., of entering judgments on the General Verdicts in favor of each Respondent for the amounts awarded them, respectively (R. 391-392), together with interest at the

rate of 6% per annum from May 15, 1958, and that all costs in all Courts be taxed against Petitioner.

Most respectfully submitted,

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Certificate of Service

Copies of the foregoing Brief For Respondents have been served upon Mr. Howard S. Hoover, Messrs. Arterbury, Hoover & Graham, and Messrs. Hutcheson, Taliaferro & Hutcheson, attorneys and counsel for Petitioner, by depositing the same in the United States post office at Houston, with first class postage prepaid, properly addressed to said counsel for Petitioner at their respective post office addresses.

Maurice M. Davis

Attorney for Respondents